IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 5TH DECEMBER 2007 / 14TH AGRAHAYANA 1929

FAO.No. 140 of 2007()

AS.84/2001 of ADDL.DISTRICT COURT (ADHOC) FAST TRACK III, MANJERI
OS.84/1995 of SUB COURT, MANJERI

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APPELLANTS(RESPONDENTS/DEFENDANTS)

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1. CHAKKIKUTTY, W/O.CHAMAKKALAYIL NADI.
2. CHATHAN, S/O.CHAMAKKALAYIL NADI.
3. CHELLY, S/O CHAMAKKALAYIL NADI.
4. UNNIATHAN, S/O CHAMAKKALAYIL NADI.
5. KUTTIPPALAN, S/O.CHAMAKKALAYIL NADI.
6. UNNITHAN, S/O.CHELLY.
7. ARUMUGHAN, S/O.CHELLY.
8. VELAYUDHAN, S/O.CHELLY,
9. OMALA, W/O.CHELLY.
10. LAKSHMI, D/O.CHELLY.
11. SAROJINI, D/O.CHELLY.
12. SREEMATHY, D/O CHELLY.
13. JANAKI, D/O CHELLY.
14. C.SAMI, S/O.UNNITHAN.
15. CHAKKI, W/O.CHOOLAN.
16. SUBRAMANIAN, S/O.CHOOLAN.
17. CHANDRAN, S/O.CHOOLAN.
18. GANGADHARAN, S/O.CHOOLAN.

19. SIVADASAN, S/O.CHAKKI.

20. INDIRA, D/O.CHOOLAN.

21. RAMANI, D/O CHOOLAN.

22. UNNIKUNHI, D/O.UNNITHAN.

23. KARICHI, D/O.UNNITHAN.

24. THANYAYI, D/O.UNNITHAN.

25. MUNDI, D/O.UNNITHAN.
(ALL THE APPELLANTS ARE RESIDING AT KARUMARAKKADU AMSOM, VAZHAKKAD P.O., ERNAD TALUK, MALAPPURAM DISTRICT.)

BY ADV. SRI.R.RAJESH KORMATH

RESPONDENTS: APPELLANTS AND RESPONDENTS 7 AND 8/PLAINTIFFS
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1. LAKSHMI,D/O.KORU,

2. CHIRUTHAKUTTY, D/O.KORU.

3. SAROJINI,D/O.KORU.

4. YESODHA, D/O.CHAMAKKALAYIL NADI,

5. SREEDHARAN, S/O.CHAMAKKALLAYIL NADI,
(RESPONDENTS 1 TO 5 ARE RESIDING AT KARUMARAKKADU AMSOM, VAZHAKKAD P.O., ERNAD TALUK, MALAPPURAM DISTRICT.

BY ADV. SMT.PRABHA R.MENON
SRI.M.KRISHNAKUMAR

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 05/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

F.A.O.No.140 OF 2007

Dated this the 5th December, 2007.

J U D G M E N T

The defendants in O.S.No.84/1995, on the file of the Sub Court, Manjeri, are the appellants. This appeal is filed against an order of remand passed by the lower appellate court by which it set aside the decree and judgment passed by the trial court, and remanded the case for fresh disposal, after allowing three applications filed by the plaintiffs in the appeal.

2. Respondents 1 to 3 filed a suit for injunction restraining the appellants from trespassing into the suit property and committing act of waste. A commissioner was deputed who filed Ext.C1 report and Ext.C2 rough plan. On the side of the plaintiffs, Pws.1 and 2 were examined. On the side of the defendants, DW.1 was examined. The Trial Court found that the report of the commissioner was not helpful in deciding the issue. It was further held that the suit properties were not properly identified, and dismissed the suit. Challenging the decree and judgment, plaintiffs filed A.S.No.84/2001 before the Additional District Court, Manjeri. In the appeal, appellants

filed a petition to amend the appeal memorandum. They also filed I.A.No.1059/2003 to depute an Advocate Commissioner and also a Taluk Surveyor for filing a report and plan. The lower appellate court allowed the appeal and remanded the matter to trial court, after allowing I.A.No.1059/2003. Advocate Pramod was appointed as the Advocate Commissioner and the plaintiffs were directed to pay an amount of Rs.2000/= as batta to the Commissioner and directed the Commissioner to file the report before the trial court. I.A.No.1060/2003 filed by the plaintiffs to accept additional evidence was also allowed, after remanding the matter, and directed the trial court to accept the documents subject to proof and relevancy. Plaintiffs had also filed I.A.No.31/2006 for amending the plaint. That application was also allowed on the ground that the appeal was allowed and the case was remanded. The lower appellate court directed the plaintiff to carry out the amendment within 15 days from the date of receipt of the records by the lower court, and directed the parties to appear before the trial court on 28.4.2007. Challenging the order of remand, this appeal is filed.

2. Appeal was admitted on the questions of law framed in the appeal memorandum and notices were issued.

3. The suit was for decree of permanent prohibitory injunction restraining the respondents from trespassing into the suit property. So, the most important question to be proved in the suit was the identity of the property and also the right of the plaintiffs. Along with the plaint, a commission application was filed, which was allowed. A commissioner was deputed who filed Ext.C1 report and Ext.C2 plan. Both sides had not filed any objection to the report of the Commissioner. The Trial Court found that the Commissioner inspected the property without notice to the defendants and after considering the report of the Commissioner, took a view that the identification of the property by the Commissioner cannot be accepted. So, the suit was dismissed. The lower appellate court also agreed with the finding of the trial court that no relief can be granted to the plaintiffs on the strength of Ext.C1 report and Ext.C2 plan, but thought it fit to grant an opportunity to the plaintiff to get the property adducing further evidence. Hence, the judgment and decree of the trial court was set aside and the case was remanded. I do not find any grounds to

interfere with the order of remand. No substantial questions of law arises in this appeal. So the challenge against the order of remand is only to be rejected. I do so.

4. The procedure of the lower appellate court in dealing with the three applications does not appear to be proper and legal. An application to appoint Commissioner was filed in the appeal. The learned District Judge should have either allowed that application and deputed a Commissioner from that court and he should have received a report, considered the same and dispose of the appeal, or else, he ought to have transmitted that application with a direction to the trial court to consider the same. Before appointing a Commissioner, the Court below ought to have set aside the Commission report already on record. In fact, though both the courts have found that the report and plan were not helpful, but no formal order setting aside Exts.C1 and C2 is seen passed. Further, in the operative portion of the order of remand, the lower appellate court observed that both parties can take steps including taking out a commission, as per the order in I.A.No.1059/2003. The court below instead of allowing the petition to receive the documents produced before it, either ought to have

transmitted that I.A. along with additional evidence produced also to the trial court, or should have directed the appellant to take back those records and produce the same before the trial court. Of course, this appellate court can also admit additional evidence, then it would have considered whether the party who seeks to adduce additional evidence has made out any grounds under Order XLI Rule 27 of the Civil Procedure Code. The order passed by the lower appellate court allowing the plaintiff to amend the plaint was also not legal and proper. The lower appellate court had not considered whether the plaintiffs had established any ground to amend the plaint. Hence, the orders passed by the lower appellate court in I.A.Nos.1059 and 1060/2003 and I.A.No.31/2006 are unsustainable and liable to be set aside. The lower appellate court is directed to transmit those three interlocutory applications along with the records produced by the plaintiffs, along with the objections, if any, filed by the defendants, to the trial court, so that, the trial court can consider those applications and pass appropriate orders, in accordance with law. If the plaintiffs had already paid the Batta to the Commissioner, the trial court shall also appoint the same Commissioner and give credit to the Batta already paid, in case it allows the application to appoint the Commissioner. I

also make it clear that I have set aside the orders passed by the lower appellate court only on account of the procedural irregularity and this judgment will not be a bar for the trial court in allowing those applications, in case, the court finds it just and proper to allow those applications. It is open to both sides to adduce evidence, if so advised.

With the above observations, this appeal is closed.

K.PADMANABHAN NAIR,
JUDGE

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